

## LAW OF WAR SEMINAR

### SCENARIO

In the fall of 2002, North Korea faced its seventh year of famine and another grim winter. The isolated and impoverished Stalinist outpost has been steadily destabilizing since the 1970s when higher oil prices and a growing technological gap undermined its industrial strategy. North Korea exacerbated its economic problems when it spurned economic and agricultural reform, while maintaining rigid state control and high levels of military spending. By 1980, North Korea had defaulted on all of its foreign loans except those from Japan.

In July 1994, Kim Il Sung, the self-styled “Great Leader” died after dominating the political, economic, and cultural life in North Korea for almost fifty years. Control of the country passed to his son, Kim Jong-il, an individual widely perceived to be weak and ineffectual. Following Kim Jong-il’s succession, North Korea experienced a series of natural disasters and sank into famine. By 1998, experts estimated that more than two million people had starved to death. Foreign aid has slowed to a trickle due to persistent allegations that the North Korean Government was diverting the aid to its military apparatus while starving the civilian population. By the year 2000, only the on-going military and financial aid from China sustained the North Korean regime.

On 15 August 2002, Chen Shui-bian, the President of Taiwan was reelected with an 80% majority vote. As early as June 2000, Chen Shui-bian openly questioned whether China possessed the military capabilities to successfully invade Taiwan. Interpreting his margin of victory as a clear mandate, he declared Taiwan an independent nation and applied for membership in the United Nations. Chinese President Jiang Zemin immediately called for the use of military force to return the “renegade province” of Taiwan to China. Jiang Zemin then notified Kim Jong-il that, in order to ensure the concentration of scarce resources for the upcoming conflict with Taiwan, the massive aid from China to North Korea would cease immediately.

In desperation, Kim Jong-il began negotiations for increased aid from South Korea. South Korean President Kim Dae Jung perceived this request as an opportunity to use economic incentives to end hostilities and eventually move toward reunification. He agreed to an extensive aid package on the condition that Kim Jong-il sign an agreement to work toward the reunification of the divided peninsula. On the evening of 1 September 2002, South Korean media played a news clip of Kim Dae Jung and Kim Jong-il solemnly shaking hands, smiling, and toasting each other with champagne. Kim Dae Jung then announced the implementation of a \$200 million dollar aid package to North Korea by November 2002.

Kim Dae Jung’s announcement touched off a firestorm. Disgruntled workers and unemployed citizens rioted in the streets of South Korea, protesting the additional financial burden and demanding the \$200 million dollars be spent revitalizing the battered South Korean economy. In the ensuing melee, five strikers were killed and hundreds of others were injured when they clashed with South Korean riot police.

Using inflammatory language, Lee Min-Jae, the charismatic leader of the Korean Brotherhood of Trade Unions and the chairman of the Korean Labor Party (KLP), accused President Kim Dae Jung of using the blood and sweat of the South Korean workers to prop-up the North Korean dictatorship. His speech incited on-going and extensive protests, during which excited crowds attacked municipal government buildings and local police stations. The increasingly militant demonstrators quickly overwhelmed the South Korean riot force. President Kim Dae Jung finally ordered the arrest of Lee Min-Jae. Escaping the arrest attempt, Lee and his supporters fled to Pusan, far from President Kim Dae Jung's stronghold in the Cholla region. In Pusan, Lee Min-Jae established a base of operation and transformed the Korean Labor Party to the Korean Labor Party Irregular Force (KLPIF). The KLPIF began to assert authority over local territories and attacked specific military targets in an effort to incite a general uprising against the central government. President Kim Dae Jung quickly ordered the Republic of Korea (ROK) Army to enter into Pusan to eliminate the KLPIF. After two short and intense encounters resulting in over 200 ROK and 3000 KLF members killed, Lee Min-Jae and his primary military advisors were arrested and brought to Seoul for trial. Politically weakened by the KLPIF uprising, President Kim Dae Jung lacked the clout to push through the proposed aid package for North Korea. By the end of November, Kim Jong-il was angered and humiliated when the promised aid from South Korea failed to materialize.

Within days, Radio Pyongyang began broadcasting lengthy diatribes by Kim Jong-il. He called Kim Dae Jung a "Capitalist Blood Sucker" who deliberately intensified North Korean famine by promising vital food aid, then reneging on his promise at the last minute. Kim Jong-il claimed this was a calculated move to starve the North Korean people during the winter of 2002 and thus lay groundwork for a South Korean military invasion in the spring of 2003.

**250348 December 2002:** North Korean Special Forces units infiltrated South Korea from a maze of underground tunnels and advanced toward their objectives. Shortly after midnight, reports of sporadic violence began to trickle into Seoul. Several police stations, government buildings, airports and rail lines were damaged or destroyed by explosions. Power lines fell and major power stations in Tongduchon, Kumchon, Chuchon, Uijongbu, and Seoul were destroyed, leaving a large civilian population without power and forcing many military facilities to switch to back-up systems. Several key leaders in the South Korean Government and business community were killed or captured. Strangely, reports from the demilitarized zone (DMZ) did not indicate any unusual activities.

**250500 December 2002:** Radio Pyongyang announced that the glorious Korean People's Army (KPA) had finally entered South Korea "in self-defense against future aggression by the South Korea Government" and would liberate their oppressed brothers and sisters. The radio message urged all "oppressed South Koreans to rise up and overthrow the decadent regime of President Kim Dae Jung and evict the American Imperialists soldiers from the Korean peninsula." Shortly after the radio message, explosions simultaneously rocked Camp Casey, Camp Red Cloud, and Camp Humphreys. Despite the deafening noise and billowing smoke, no actual destruction appeared to have occurred. Minutes later, soldiers of the 4<sup>th</sup> Chemical Company at Camp Casey realized that the incoming cloud was not smoke, but Sarin gas, a colorless, odorless nerve agent far deadlier than cyanide gas. Within minutes, nerve gas casualties overwhelmed the health clinics. When medical personnel attempted to coordinate

movement of casualties to nearby civilian hospitals, they found many of these hospitals heavily damaged by car bombs.

**250545 December 2002:** Simultaneous reports arrived from several points in the DMZ confirming North Korean columns attacking across the 38<sup>th</sup> parallel. Without prior mobilization, the KPA attacked from the march. On the border between Kimpo and Kaesong, the Republic of Korea (ROK) 12<sup>th</sup> Regiment was heavily engaged by North Korean units led by armor columns containing the newest Chinese tanks. To the east, the KPA 3<sup>rd</sup> and 4<sup>th</sup> Divisions led the attack against the ROKA 7<sup>th</sup> Division. Several US military members of the Special Forces Detachment-Korea, serving as special liaisons between the Korean Special Forces and the US military, were in overrun forward positions and presumed to have been killed or captured. Aside from the military activities, USFK also received information that starving North Korean civilians were following the regular North Korean troops across the 38<sup>th</sup> parallel in very large numbers. Most appeared to be looting for food. However, some reports also indicated isolated instances of arson and violence.

**250600 December 2002:** The USFK staff received notice that sensor satellites detected a launch of ten missiles and possible launch of a dozen more from North Korean territory. The Nodong medium range missiles first struck Osan Airbase, home of the U.S. 7<sup>th</sup> Air Force, then Kusan, where the 8<sup>th</sup> Fighter wing resides. Although most of the airplanes remained safe in their hardened bunkers, air control facilities and runways in Osan and Kusan were severely damaged. A number of missiles missed their intended targets and slammed into civilian residential areas around the airfields.

**26 December 2002:** The United Nations Security Council met in emergency session and adopted Security Council Resolution 3050 (copy attached).

**27-28 December 2002:** The KPA continued their advance into South Korea, pushing the retreating South Korean and U.S. forces southward in front of them.

**29 December 2002:** The United Nations Security Council again met in emergency session and adopted Security Council Resolution 3051 (copy attached).

**30 December 2002:** The remnants of the U.S. 2nd Infantry Division and ROK forces fell back to the city of Seoul. Poor logistics and inadequate supplies slowed the advance of the KPA. The U.S. 101<sup>st</sup> Airborne Division, 82<sup>nd</sup> Airborne Division, 25<sup>th</sup> Infantry Division, and II Marine Expeditionary Force are mobilized and preparing to reinforce the retreating 2<sup>nd</sup> Infantry Division. The U.S. 1<sup>st</sup> Cavalry, 4<sup>th</sup> Infantry Division (Mechanized) and I Marine Expeditionary Force are on tap as follow-on forces.

United Nations

**S/RES/3050 (2002)**



**Security Council**

Distr.: General  
26 December 2002

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## **Resolution 3050 (2002)**

**Adopted by the Security Council at its 6015 meeting, on  
26 December 2002**

*The Security Council,*

*Recalling* the findings of the General Assembly in its resolution 293 (IV) of 21 October 1949 that the Government of the Republic of Korea (South Korea) is a lawfully established government having effective control and jurisdiction over that part of Korea in which the great majority of the people of Korea reside, and that this Government is based on elections which were a valid expression of the free will of the electorate of that part of Korea.

*Alarmed* by the invasion of South Korea on 25 December 2002 by the military forces of the Democratic People's Republic of Korea (North Korea),

*Determining* that there exists a breach of international peace and security as regards the North Korean invasion of South Korea,

*Determined* to bring the invasion and occupation of South Korea by North Korea to an end and to restore the sovereignty, independence and territorial integrity of South Korea,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Condemns* the North Korean invasion of South Korea,
2. *Demands* that North Korea withdraw immediately and unconditionally all of its forces to the positions they occupied prior to 25 December 2002,
3. *Decides* that all states shall prohibit and prevent the import of all commodities originating in North Korea and any activities by their nationals which promote the

export of any commodities to North Korea or the sale or supply of any commodities, including weapons or any other military equipment to North Korea,

4. *Calls* upon all states to act strictly in accordance with the provisions of the present resolution,

5. *Decides* to meet again as necessary to consider further steps to ensure compliance with this resolution and the restoration of international peace and security.

United Nations

**S/RES/3051 (2002)**



**Security Council**

Distr.: General  
29 December 2002

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## **Resolution 3051 (2002)**

**Adopted by the Security Council at its 6016th meeting, on  
29 December 2002**

*The Security Council,*

*Reaffirming* its Resolution 3050 (2002) of 26 December 2002, demanding that the Democratic People's Republic of Korea (North Korea) withdraw immediately and unconditionally its forces from the territory of the Republic of Korea (South Korea), and imposing economic sanctions under Chapter VII of the Charter of the United Nations,

*Noting* that, despite all efforts by the United Nations, North Korea refuses to comply with its obligation to implement Resolution 3050 (2002) of 26 December 2002,

*Mindful* of its duties and responsibilities under the Charter of the United Nations for the maintenance and preservation of international peace and security,

*Determined* to secure full compliance with its decision,

*Acting* under Chapter VII of the Charter of the United Nations,

*Demands* that North Korea comply fully with Resolution 3050 (2002) of 26 December 2002,

*Authorizes* Member States cooperating with the Government of South Korea to use all necessary means to uphold and implement Security Council Resolution 3050 and to restore international peace and security in the area,

*Requests* all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of this resolution,

*Decides* to remain seized of the matter.

# **LAW OF WAR SEMINAR**

## **PROBLEMS**

**1. After CINC, USFK received confirmation that sarin gas was used by the North Koreans to attack Camp Casey, Camp Red Cloud, and Camp Humphreys, he asks his legal staff to brief him on his authority to use “like-kind chemicals” against the North Koreans.**

**2. Following the North Korean sarin gas attack upon Camp Casey, Camp Red Cloud and Camp Humphreys, satellite intelligence assets located what appears to be a chemical munitions factory near a residential area of the city of Kanggye, North Korea. A captured KPA MI colonel and a high level political deserter both confirm that this factory is a North Korean chemical and conventional munitions factory at which the agent sarin is developed, stored, and processed. According to the new intelligence, this is Kanggye Factory No. 26, which employs approximately 250 workers. In addition to its illicit chemical production, this factory is also used to produce the riot control agent CS gas for North Korean law enforcement use, various pesticides for commercial and military usage, and a number of conventional munitions. Several thousand civilians, mostly dependents of factory workers, reside in an area near the factory.**

**A. Members of the coalition forces’ Joint Targeting Cell hotly debate whether to add Factory No. 26 to the target list for attack. The targeteers propose to employ a mixture of air delivered incendiary and high explosive munitions in the attack against the factory. Prior to making his recommendation to CINC USFK, the J-3 asks you to prepare a memorandum on the law of war (LOW) principles relevant to the process of targeting. Brief the J-3 on the LOW principles implicated by the possible attack of Factory 26 and how they are employed in the targeting analysis.**

**B. Following the conduct of the weaponeering process, the Targeting Cell recommends to CINC USFK that Coalition Forces employ a mixture of air delivered incendiary weapons and high explosive munitions. The J-3 argues that use of incendiary weapons against Factory 26 will substantially reduce the risk of civilian casualties resulting from a possible chemical release into the environment. Are there any legal prohibitions upon the use of incendiary weapons?**

**3. The CG, 2<sup>nd</sup> Infantry Division is concerned about the KPA using South Korean citizens as human shields when they attack Seoul. He wants authority to use riot control agents (RCA) if such a possibility arose. He argues that using RCAs is a good way to prevent injury to the South Korean hostages while protecting the life of his soldiers. Advise the CG on the international law and domestic law and policy on employing RCA under these circumstances.**

**4. The CG, 2<sup>nd</sup> Infantry Division also wants to use non-self destructing, i.e., “dumb” anti-personnel landmines (APL) to protect the perimeters of Seoul. However, he is unsure about his legal authority in light of the various landmine treaties, executive orders, and moratoriums he has heard about. Brief the CG on the law and policy relevant to APL employment.**

**5. Aerial photographs and other intelligence assets disclosed the following possible targets in Pyongyang, North Korea. You are the Operational Judge Advocate advising the targeting cell as it examines whether to add the particular item to the Coalition force’s target list for attack. Review the following missions and targets for compliance with the law of war and advise the USFK planners accordingly.**

**A. A large power plant located at the northeast edge of Pyongyang, North Korea, which serves not only the North Korean KPA military headquarters, but also all of the civilian hospitals and residential areas of the city.**

**B. Troop billets (located in citizens’ homes) in the southern part of the city. A large church located in the center of the billeting area.**



**C. A barracks complex at the western edge of the city which is marked with the Red Cross emblem on all its buildings. Intelligence assets have not determined whether this barracks complex has actually been converted into a hospital.**

**D. A 40 ft. statue of the North Korean Leader, Kim Il Sung, located by itself in a large park.**

**E. A railroad station located in the center of the city. A residential area surrounds the station. The station is located in such a manner that the rail line could be effectively interrupted at this point. The risk of Coalition casualties is minimal. The railroad crosses several bridges outside the city. Destroying the railroad and the bridges would entail the use of the same amount of ordnance and would have the same effect as destroying the tracks at the rail station, but would also bring Coalition aircraft within range of SAM sites and significantly increase the risk of friendly casualties. By the same token, this attack will significantly reduce the risk of civilian casualties. Does the Law of War require CINC USFK to choose one target over the other?**

**6. As the operational law attorney for the 82<sup>nd</sup> Airborne Division, you have been asked to review the ROE before the unit deploys to Korea. The 82<sup>nd</sup> Airborne Division's assigned area of operations will contain few, if any, friendly forces or civilian populace. The commander seeks to incorporate the following language into the Rules of Engagement for designated areas, such as the fields of fire around the Division's nighttime perimeters. What do you think?**

**“SPECIFIED STRIKE ZONES: Areas designated by the Division Commander in which there are no friendly forces or civilian populace and in which all targets may be attacked on the initiative of individual soldiers. There is no requirement for further clearance or coordination prior to the initiation of combat activity.”**

**7. Assume that Coalition forces have stopped the North Korean Army and begun to gain momentum, pushing the retreating KPA northward in front of it. Converging on Highway 1, the shortest route back to North Korea, KPA troops are flooding northward toward the Uijongbu Corridor and the 38<sup>th</sup> parallel. USFK planners intend to allow KPA forces to withdraw along the highway and then fix them in place utilizing air-dropped land mines. Once the KPA is fixed in place, air assets can then conduct massive aerial attacks against these forces, utilizing the full arsenal of weapons. The operation is called “Operation TURKEYSHOOT.” Is this plan lawful?**

**8. While coordinating with the JA on changing the name from “Operation Turkeyshoot” the USFK PAO wants to discuss the following issue. Intelligence reports indicate a labyrinth of KPA fortified tunnels in and around Pyongyang which are probably impervious to airstrikes and indirect fire weapons. Therefore, USFK is considering utilizing blade tanks to employ the “plow tactic” made famous during DESERT STORM. The PAO is concerned about the lawfulness of this tactic, not to mention the public affairs angle. What’s the deal?**

# LAW OF WAR SEMINAR

## INSTRUCTORS' GUIDE

**1. After CINC, USFK received confirmation that sarin gas was used by the North Koreans to attack Camp Casey, Camp Red Cloud, and Camp Humphreys, he asks his legal staff to brief him on his authority to use “like-kind chemicals” against the North Koreans.**

Answer:

In 1975, the United States ratified the “Protocol for Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare” of 1925 (Geneva Gas Protocol). Under this protocol, the United States reserved the right to retaliate in kind if chemical warfare agents were first used against our forces or allies.

The United States ratified the Chemical Weapons Convention (CWC) in April 1997. Under the CWC, the United States agreed not to use, develop, produce, acquire, stockpile, or retain chemical weapons for any reason. The CWC mandates that existing stockpiles of chemical weapons must be dismantled (within a certain number of years) and implements an aggressive international inspection regime for purposes of verification.

Chairman of the Joint Chiefs of Staff Instruction 3110.07A, “Nuclear, Biological, and Chemical Defense; Riot Control Agents; and Herbicides,” 15 December 1998, implements the United States’ obligations under the CWC.

Analysis:

Under the CWC, any use (or even retention) of chemical weapons is unlawful. The U.S.’ treaty obligation under the CWC is inconsistent with our 1975 reservation to the 1925 Geneva Gas Protocol. The U.S. will not use chemical weapons under any circumstances, including in retaliation for a first use against the U.S. or U.S forces. CINC USFK’s legal staff should advise him accordingly.

**2. Following the North Korean sarin gas attack upon Camp Casey, Camp Red Cloud, and Camp Humphreys, satellite intelligence assets located what appears to be a chemical munitions factory near a residential area of the city of Kanggye, North Korea. A captured KPA MI colonel and a high-level political deserter both confirm that this factory is a North Korean chemical and conventional munitions factory at which the agent sarin is developed, stored, and processed. According to the new intelligence, this is Kanggye Factory No. 26, which employs approximately 250 workers. In addition to its illicit chemical production, this factory is also used to produce the riot control agent CS gas for North Korean law enforcement use, various pesticides for commercial and military usage, and a number of conventional munitions. Several thousand civilians, mostly dependents of factory workers, reside in an area near the factory.**

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**air delivered incendiary and high explosive munitions in the attack against the factory. Prior to making his recommendation to CINC USFK, the J-3 asks you to prepare a memorandum on the law of war (LOW) principles relevant to the process of targeting. Brief the J-3 on the LOW principles implicated by the possible attack of Factory 26 and how they are employed in the targeting analysis.**

Comment:

This question is designed to familiarize students with principles of the law of war which are relevant to the process of targeting and to provide the student with an example of the legal analysis based on those principles.

Answer:

Fundamental rules of the law of war form the foundation for lawful targeting during armed conflict:

1. Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied. (Customary International Law (CIL))
2. The right of belligerents to adopt means of injuring the enemy is not unlimited. (HR, art 22).
3. It is prohibited to launch attacks against the civilian population as such. (CIL, codified in GP I, art. 51 (2)). Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible. (CIL, codified in GP I, arts. 57(1) & 57(4)).

These fundamental rules express the following basic principles of the law of war:

1. Principle of **Military Necessity**.

This principle justifies those measures, not forbidden by international law, which are indispensable for securing the complete submission of the enemy as soon as possible. (FM 27-10, para 3). A military necessity must exist to conduct a contemplated attack (HR, art. 23). Military necessity relates to the **military advantage** offered by the attack. Only **Military Objectives** offer a military advantage and may be attacked. The contemplated military objective must not be prohibited under international law and its destruction must be indispensable to the submission of the enemy. Military Objectives include combatants and certain objects.

- **Combatants**. Combatants include belligerent military forces (HR, art. 1), but depending upon the circumstances, may also include unprivileged combatants, such as civilians taking an **active part** in hostilities.

- **Objects** which, by their nature, location, purpose, or use make an **effective** contribution to military action **and** whose total or partial destruction, capture, or neutralization offers a definite **military advantage** to the attacker in the **circumstances ruling at the time** are military objectives (CIL; GP I, art. 52(2)). Military advantage may involve a variety of considerations, including the security of the attacking force. Furthermore, military advantage need not necessarily refer to the isolated attack under consideration, but may relate to the attack in the context of the overall operational plan or war strategy.

2. Principle of **Distinction**.

This principle requires that military forces **distinguish combatants from non-combatants and military objectives from civilian objects**. Parties to a conflict may direct their operations only against combatants and military objectives (CIL; GP I, art 48). Indiscriminate attacks are those which fail to make these distinctions. An attack may be indiscriminate because it is not directed at a military objective; because it employs a means or method which cannot be directed at a military objective; or because the effects of the means or method cannot be limited to a military objective (CIL; GP I, art 51(4)).

- **Civilians and civilian objects** may **not** be made the object of intentional (direct) attack (CIL, GP I, art. 51(1)).

**Civilians** lose their immunity from direct attack when they take an active part in hostilities. Note that GP I, art 51(3), employs a “direct part” rather than “active part” standard for determining when civilians become unprivileged combatants and legitimate objects of direct attack.

**Civilian objects** consist of all civilian property and activities other than those used to support and sustain the enemy’s war-fighting capability (CIL; GP I, art. 52(1)(2)).

The intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use, is prohibited. (CIL; GP I art. 54(4)).

Civilian vessels, aircraft, vehicles, and buildings may only be lawfully attacked if they are used for military purposes, including the housing of military personnel, equipment or supplies, or are otherwise associated with combat activity inconsistent with their civilian status **and** if collateral damage and incidental injury would not be excessive in relation to the direct and concrete military advantage anticipated from the attack (CIL, GP I, art 52)(See Proportionality discussed below).

Hospital ships, medical units, medical vehicles and aircraft, non-interfering neutral vessels, civilian churches and chapels, civilian educational institutions, and cultural objects may not be attacked unless they are being used by the enemy for prohibited (military) purposes (CIL, GP I, art. 21-27, 52, 53).

### 3. Principle of **Proportionality**.

This principle recognizes the fact that under the law of war it is not unlawful to cause **incidental injury or death to civilians**, or **collateral damage to civilian objects**, during an attack upon a legitimate military objective. The Principle of Proportionality requires, however, that the incidental loss of civilian life, injury to civilians, or damage to civilian objects, or a combination thereof caused by the attack, must not be excessive in relation to the **concrete and direct military advantage** anticipated from the attack. (CIL, GP I, arts. 51(5)(b) & 57(2)(a)(ii) & (iii)).

Commanders must take all reasonable precautions to keep civilian casualties and damage to civilian objects to a minimum consistent with mission accomplishment and security of the force. (CIL, GP I, art 57). Note that GP I, art. 57(2)(a)(ii) requires military forces to “take all feasible precautions.” To the extent this purports to establish a standard more stringent than “reasonable precautions” (as stated in GP I, art 57(4)), the U.S. rejects it.

If civilian casualties and damage are likely as a result of a contemplated attack, the Commander must consider whether to adopt an alternative method of attack, if reasonably available, to reduce

such casualties and damage. In making this determination, a Commander may consider the need to conserve resources needed to accomplish the mission and the security of the force. The fact that a military force possesses precision guided munitions (PGMs), for example, does not **necessarily** indicate that it must employ such weapons in a particular attack, even if such employment would reduce incidental injury to civilians and collateral damage to civilian objects. Furthermore, a military force need not **necessarily** employ a means or method of attack, which might reduce civilian casualties or collateral damage, if this would also increase friendly casualties. Casualty avoidance and resource conservation, as well as military advantage in the context of the operational and strategic plan, are all legitimate considerations in determining a method of attack. (This issues is discussed further in question 5E below).

Commanders must determine whether the possible incidental death or injuries to civilians and collateral damage to civilian property would be excessive, on the basis of all facts reasonably available at the time (Rendulic Rule). If the anticipated military advantage (target value) is high, the deaths and injuries of civilians, and damage to civilian property must be commensurably high in order to be excessive.

#### 4. Principle of **Unnecessary Suffering**.

This principle prohibits the employment of arms, projectiles, or material calculated to cause unnecessary suffering (HR, art. 23e).

##### Analysis:

Key facts indicate that Factory 26 employs approximately 250 workers and is located “near” a residential area of the city of Kanggye, North Korea, where several thousand civilians reside. The factory produces conventional munitions and chemical products for commercial and law enforcement usage, in addition to its production of the unlawful nerve agent sarin. The proposed attack contemplates a mixture of incendiary and high explosive munitions.

The Judge Advocate should assist the Commander and targeting cell in conducting a targeting analysis in order to determine the lawfulness of the proposed attack against Factory 26.

The first issue is to ask whether Factory 26 is a **military objective** and whether a **military necessity** exists to conduct the attack. Factory 26 is a military objective; it is an object, the purpose and use of which clearly make an effective contribution to North Korean military action. Furthermore, its total or partial destruction will offer a definite military advantage to Coalition Forces under the circumstances. Factory 26 produces lawful chemical agents for commercial usage, in addition to its production of conventional munitions and the unlawful nerve agent Sarin. The North Korean’s have employed Sarin as a chemical weapon against Coalition Forces. Destruction of the sarin gas production and storage facility is indispensable to submission of an enemy that has already demonstrated its intention to level its disadvantage in conventional weapons through employment of asymmetric means, including chemical weapons. A military necessity exists for Coalition Forces to render the North Koreans incapable of further chemical weapons use.

Since it has a legitimate non-military purpose, as well as a military purpose, Factory 26 may be considered a “**dual use**” **target**. The fact that the factory has a civilian, as well as a military purpose, does not render it immune from attack, but immediately implicates the need to conduct a proportionality analysis (discussed below).

In assisting the Commander and targeting cell, the Operational Judge Advocate must conduct a thorough map study. In this case, assume that the factory is located less than 500 meters from the leading edge of the residential area. It is immediately apparent that an attack against Factory 26 may very well result in incidental injury or death of civilians and/or collateral damage to their property. This fact, like the “dual use” nature of the target, implicates the need to conduct a proportionality analysis (discussed below).

If an attack is likely to result in incidental injury or death to civilians or collateral damage to civilian property, the Commander **must** conduct a **Proportionality Balancing Test**: the Commander must determine whether the possibility of incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, would be excessive in relation to the direct and concrete military advantage anticipated from the attack.

If the anticipated incidental injury or death to civilians or collateral damage to their property would be excessive in relation to the anticipated military advantage, then the attack is considered “indiscriminate” and is prohibited under CIL & GP I, art. 51(4).

Even if an attack does not violate the Proportionality Balancing Test, the Commander must take all “practicable” precautions to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force. This is the U.S.’ view of the CIL standard. Note that GP I, art. 57(2)(a)(ii) purports to impose a standard of “all feasible precautions.”

CINC USFK must conduct a Proportionality Balancing Test. In order to do so, he must possess sufficient information to ensure the target is a military objective within the meaning of CIL and GP I, art 52(2). Two North Korean sources indicate that Factory 26 is a sarin gas production and storage facility, and satellite imagery seems to confirm it is a chemical munitions factory. Whether CINC USFK possesses sufficient information at this time to conduct the attack is a matter of judgment. Clearly, the prudent Commander must employ all reasonable methods/sources of information to verify the nature of a contemplated target. Under the “Rendulic rule,” a commander’s decision to conduct an attack is judged based upon the information he possessed at the time, as long as he made reasonable efforts to obtain sufficient information.

Given the nature of the proposed target (a lethal and non-lethal chemical production and storage facility and munitions factory); its location (within 500 meters of an area inhabited by thousands of non-combatants) and its staffing (possibly by 250 civilians), a likelihood exists that its attack will cause incidental injury or death of civilians and collateral damage to their property.

Attack of Factory 26 may cause release of the nerve agent sarin gas, as well as CS gas, and other chemicals into the environment. Further, its attack with high explosive conventional weapons may result in secondary explosions when its munitions (and related sub-products) are detonated. This raises questions of “weaponeering” discussed below.

The concrete and direct military advantage anticipated from the attack of Factory 26 is very high since this Factory produces and stores a lethal nerve agent that could be devastatingly employed against Coalition Forces as a weapon of mass destruction (WMD). The advantage is not speculative, as North Korea has already displayed the will to use these chemical weapons in their sarin gas attack against 2<sup>nd</sup> Infantry Division soldiers.

Since the target value is so high, the collateral deaths, injuries, and damage to civilians and their property must be commensurably high in order to be excessive. While an absolute prediction of the harm civilians may suffer may not be possible, depending upon the information available to targeteers, reasonable estimates of such harm may be possible.

In order to determine a reasonable estimate of possible civilian harm, the Commander and targeteers (with the Judge Advocate's assistance) must conduct a process sometimes referred to as "weaponneering." Weaponneering is an inherent part of the targeting analysis necessary any time a proportionality analysis is required (i.e., any time civilians or their property may be impacted by a proposed attack).

Weaponneering is complex and requires both "operational" and legal analyses. The operational analysis includes the process of matching the appropriate weapons platform and munitions to a contemplated target. This process requires examination of a number of factors, including: the nature of the target (what it is, what it is made out of, how it is housed, what is in it, what will happen if it is hit (or missed), etc.); its location (e.g., in a concentration of civilians); the accuracy and blast impact radius of the contemplated munitions, and other factors.

The legal analysis includes the issue of whether the weapons systems and munitions contemplated for use in the attack are lawful. The contemplated weapons may not be prohibited by international or domestic law (e.g., the use of chemical weapons). The LOW provides that arms, projectiles, or material calculated to cause unnecessary suffering are prohibited. (Hague IV, art. 23 (e)). Further, lawful weapons may not be used in an unlawful manner. For example, it is unlawful to employ incendiary weapons against dismounted troops in the open, when other weapons systems are available and viable.

In conducting the Proportionality Balancing Test, CINC USFK must determine whether the possibility of incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, caused by the attack of Factory 26 would be **excessive** in relation to the direct and concrete military advantage anticipated from the attack. The term "excessive" was purposely left vague in GP I. Under CIL, what constitutes "excessive" civilian harm is entirely dependent on the military advantage anticipated from the attack. As the value of the contemplated target rises, the "excessive" standard will correspondingly rise. Though U.S. practice is to take extraordinary measures to minimize civilian harm, the practice of nations during armed conflict through time demonstrates that significant civilian harm is not unlawful if the military advantage is sufficiently great. Furthermore, in determining the military advantage anticipated, CINC USFK is not balancing the value of this attack in isolation, but rather in the context of the overall operational plan or war strategy.

As part of his Proportionality Balancing Test, CINC USFK must examine the possibility of harm of harm to all non-combatants. This includes those in the residential area near Factory 26, and the Factory workers themselves. The CIL LOW principle of Distinction, and its codification in GP I, prohibit making civilians the object of intentional attack. A question arises as to the lawfulness of direct attack against the civilian factory workers. Under the U.S. view of the CIL standard, civilians lose their immunity from direct attack when they take an "**active part**" in hostilities. GP I, art 51(3), however, employs a "**direct part**" rather than "active part" standard for determining when civilians become unprivileged combatants and legitimate objects of direct attack.



The commentary to GP I defines taking direct part as **committing a hostile act against the person of an enemy**. This standard seemingly requires that an individual “pull the trigger” or other similar combatant activity.

Thus, under the GP I “direct part” standard, the workers in the factory retain their protected status. Although they are supporting the war effort, they are not taking “direct part.” The practice of nations, however, has been to target munitions factories as military objectives since they make an effective contribution to the military action. Thus, employing the GP I standard, the possibility of incidental injury or death to these factory workers must be considered during the conduct of the Proportionality Balancing Test. If they were present during the attack (a factor which must be considered) and were injured or killed, this possibility (coupled with any other possible civilian harm) must be balanced against the anticipated military advantage. The civilian injury and deaths would not be unlawful unless the civilian harm is excessive in relation to the direct and concrete military advantage.

The U.S. approach to this issue recognizes the modern practice of employing civilian “contractors” in various capacities on the battlefield. Today, civilians perform critical combat support and combat service support roles that would otherwise require a uniformed military member. Desert Storm saw the U.S. employ civilians on the battlefield in a myriad of roles, including aircraft avionics repair, computer system operations, and numerous other functions, such as truck convoy drivers, etc. Not only were they present, in some cases, they were suited in camouflage uniforms and armed for personal safety. From the enemy’s perspective, they were legitimate targets. A military force may not employ a subterfuge to gain immunity from direct attack by employing civilians to perform roles that would otherwise require uniformed military members.

Under the U.S. “active part” standard, in light of CIL LOW analysis, the civilians at Factory 26 arguably retain their immunity from direct attack. However, in the U.S.’ view, the emerging doctrine recognizes a right to directly attack civilians performing a military role on the battlefield (i.e., taking an “active part” in hostilities). The classic example is the civilian military convoy driver. Under the U.S. view the driver may be the object of direct attack and not just “the victim” of incidental injury in an attack upon the truck itself. If civilians may be directly attacked, then their injury or death is like that of a combatant and is not factored into the Proportionality Balancing Test.

It is important to note the responsibilities that CIL and GP I impose upon the defender in addition to those it imposes upon the attacker. Under CIL and Article 58, GP I, parties to the conflict must endeavor to remove the civilian population and civilian objects under their control from the vicinity of military objectives (Article 58(b)). The parties must also avoid locating military objectives within densely populated areas. In this case, North Korea violated the LOW by locating a high-value chemical and munitions plant near a residential area and by failing to remove the civilian population from the vicinity of this military objective. The North Korean violation, however, does not relieve the Coalition Forces of their responsibilities under the LOW.

Clearly, destruction of the North Korean’s capacity to employ Sarin gas as a WMD has critical implications for continued war efforts on both sides. The conduct of the Proportionality Balancing Test and corresponding weaponeering process may conclude that attack of Factory 26 may cause dozens of civilian casualties (or more) and moderate collateral damage (or more), but the advantage anticipated by its destruction is to save thousands of lives (and material and

national treasure) on both sides. CINC USFK may conclude that the attack of Factory 26 is lawful.

If CINC USFK decides to conduct the attack he must consider his obligation to warn the civilian population prior to the attack. CIL, codified in HR, art. 26 and GP I, art 57(2)(c) imposes a duty upon an attacking force to issue a warning of an impending attack. HR, art 26 provides that the commander of an attacking force, “must, before commencing a bombardment, **except in cases of assault**, do all in his power to warn the authorities.” GP I, Article 57(2)(c) requires “effective advance warning shall be given of attacks which may affect the civilian population, **unless circumstances do not permit**.” The U.S.’ view of the caveat in the language of each treaty permits a commander to forego any warning in a case in which the security of the attacking force might be jeopardized by an advance warning. Today, should a military force employ over-the-horizon (OTH) stand-off weapons such as Tomahawk Land Attack Missiles (TLAM), arguing that surprise is essential for force security in order to avoid issuing a warning may be disingenuous.

**B. Following the conduct of the weaponeering process, the Targeting Cell recommends to CINC USFK that Coalition Forces employ a mixture of air-delivered incendiary weapons and high explosive munitions. The J-3 argues that use of incendiary weapons against Factory 26 will substantially reduce the risk of civilian casualties resulting from a possible chemical release into the environment. Are there any legal prohibitions upon the use of incendiary weapons?**

Answer:

The U.S. is a party to the 1980 *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects* (The Certain Conventional Weapons Convention or CCW).

**Protocol III** to the CCW is known as the *Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons* (Protocol III). Protocol III prohibits the use of air-delivered incendiary weapons against military objectives located within a concentration of civilians.

In terms of Protocol III, an “**Incendiary weapon** means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.”

Incendiary weapons include, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.

Incendiary weapons **do not** include munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems or munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions, in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.

Protocol III, art 2(1) prohibits making the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons. Article 2(2) prohibits making any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.

Thus, Protocol III would prohibit the contemplated use of incendiaries against Factory 26. However, the U.S. is presently not a party to Protocol III. The President has transmitted the Protocol to the Senate for its advice and consent to ratification of the Protocol. In so doing, the President recommended that the U.S. take a reservation to the Protocol that would permit air-delivered incendiary weapons use within areas of civilian concentrations, if their use will result in fewer civilian casualties.

**Analysis:**

The J-3's recommendation to employ incendiaries is not a *per se* violation of international law. The U.S. is not a party to Protocol III, nor is incendiary weapon use under these circumstances a violation of any CIL obligation. During the weaponeering process, Coalition force targeteers would seek a method of destroying the target while minimizing the risk of civilian harm. The reason for employing incendiaries against Factory 26 is that, in theory, the heat generated by the incendiary detonation will burn the chemicals on the spot and prevent their release into their environment. Conversely, high explosive conventional munitions employment alone would likely disperse the chemicals. FM 27-10, para. 36 states that incendiaries should not be used in such a way as to cause unnecessary suffering.

As in all coalition operations, differing legal obligations resulting from various nations' treaty undertakings, may complicate planning and execution of military operations.

**3. The CG, 2<sup>nd</sup> Infantry Division is concerned about the KPA using South Korean citizens as human shields when they attack Seoul. He wants authority to use riot control agents (RCA) if such a possibility arose. He argues that using RCAs is a good way to prevent injury to the South Korean hostages while protecting the life of his soldiers. Advise the CG on the international law and domestic law and policy on employing RCA under these circumstances.**

**Answer:**

The U.S. is a party to the 1993 *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction* (Chemical Weapons Convention or CWC)

**CWC Article I (5)** provides that **“[e]ach State Party undertakes not to use riot control agents as a method of warfare.”** This language has caused a tremendous amount of consternation within the United States and internationally. Its meaning is of absolutely critical importance to the U.S. military and the way in which we conduct armed conflict and Military Operations Other than War.

CWC Article II (7) defines **Riot Control Agent (RCA)** as “[a]ny chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.” This would include

agents such as CS gas, as well as Oleoresin Capsicum (i.e., cayenne pepper spray) commonly used by U.S. military forces.

The use of RCAs during armed conflict (in war) is addressed in **Executive Order 11850**. President Ford promulgated Executive Order 11850 in 1975. In E.O. 11850, the **US renounces first use of RCAs in war except in defensive military modes to save lives. EO 11850 lists examples of potential defensive uses:**

E.O. 11850 provides that: “The US renounces as a matter of national policy . . . first use of RCAs in war except in defensive military modes to save lives **such as:** [“*Such as*” indicates the listed uses are intended as examples and not to be an exhaustive list]

(a) Use of RCAs in riot control situations in areas under direct and distinct US military control, to include controlling rioting prisoners of war;

(b) Use of RCAs in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided;

(c) Use of RCAs in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners;

(d) Use of RCAs in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.”

Background on E.O. 11850: Use of riot control agents in war was the subject of international and domestic debate for years prior to CWC negotiations. The Nixon and Ford administrations carried out extended dialogue with the Senate Foreign Relations Committee in the context of ratifying the *Geneva Gas Protocol of 1925*, which bans the “use in war of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials or devices.” The U.S. maintained since the 1960’s that the *Geneva Protocol* applied only to lethal and incapacitating chemical agents and not to RCAs. The U.S. therefore contended that RCAs could be used during armed conflict. The Executive branch sought a legal interpretation that the *Geneva Protocol* did not apply to RCAs; the Senate Foreign Relations Committee favored a U.S. ban on the use of RCAs in war. In response, the Ford Administration developed E.O. 11850 as part of a compromise in the President’s efforts to obtain Senate consent to ratification of both the Geneva Protocol and the Biological Weapons Convention

Executive Order 11850 announced U.S. policy on the use of herbicides and RCAs in war. It prohibited RCA use in war, except in defensive military modes to save lives. This position constituted the basis by which the Ford administration obtained Senate approval and consent to ratification of the Geneva Protocol and Biological Weapons Convention. The text of E.O. 11850 has remained unchanged since its promulgation in 1975. As the four example uses expressed in the Executive Order make clear, the U.S. made a strong distinction between battlefield use of RCAs in an offensive mode, which was prohibited, and more limited, humanitarian uses in war, which were permitted. This distinction would eventually form the central tenet of the U.S. negotiating position during CWC Geneva Conference.

During the Geneva Conference at which the CWC was negotiated and signed, the U.S. remained fully committed to its view that the humanitarian uses of RCAs contemplated under E.O. 11850, permitting use of RCAs in war in defensive military modes to save lives, was consistent with the CWC prohibition in Article I (5).

The phrase “method of warfare” was apparently selected as compromise language precisely because constructive ambiguity surrounded the phrase and it lacked a commonly accepted definition. Intentionally chosen, it permitted various nations with divergent views, including the U.S. and U.K., to sign the treaty, an action perceived by the participants at the Conference as in all nations’ best interests. It was on this basis that the U.S. delegation agreed to the textual language on RCAs and signed the CWC text in 1993. Clearly, the U.S. signature on the CWC document in Paris was made with the understanding that the treaty allowed for the use of RCAs as permitted under Executive Order 11850.

The U.S. position was then and continued to be a subject of extensive international and domestic debate until the U.S. ratified the treaty in 1997. The ratification process between the U.S. Senate and Executive branch was also marked by considerable U.S. internal debate.

On 24 April 1997, the U.S. Senate published Senate Executive Resolution 75 – (Senate Report, S3373) Relative to the Chemical Weapons Convention, in which the Senate provided its advice and consent to ratification of the CWC, subject to 28 conditions. The Senate’s Resolution provided in relevant part that:

[Condition] (26) RIOT CONTROL AGENTS – (A) PERMITTED USES – Prior to the deposit of the United States instrument of ratification, **the President shall certify to Congress that the United States is not restricted by the Convention in its use of riot control agents, including the use against combatants who are parties to a conflict, in any of the following cases:**

(i) UNITED STATES NOT A PARTY- The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict (such as recent use of the United States Armed Forces in Somalia, Bosnia, and Rwanda).

(ii) CONSENSUAL PEACEKEEPING – Consensual peacekeeping operations when the use of force is authorized by the receiving state, including operations pursuant to Chapter VI of the United Nations Charter.

(iii) CHAPTER VII PEACEKEEPING - Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the United Nations Charter. . . .

(B) IMPLEMENTATION - **The President shall take no measure, and prescribe no rule or regulation, which would alter or eliminate Executive Order 11850 of April 8, 1975. . . .”**

Responding to the Senate’s condition to its advice and consent to ratification, on 25 April 1997, the President’s submitted his Letter of Certification to the Senate. This letter states, “the resolution . . . contains 28 different Conditions covering virtually every issue of interest and concern. I will implement these provisions. I will, of course, do so without prejudice to my Constitutional authorities, including for the conduct of diplomatic exchanges and the implementation of treaties. A Condition in a resolution of ratification cannot alter the allocation of authority under the Constitution.”

In a letter the same day to the Congress, the President stated: “In accordance with the resolution of advice and consent to ratification of the Convention . . . adopted by the Senate of the United States on April 24, 1997, I hereby certify that . . . **In connection with Condition (26), Riot Control Agents, the United States is not restricted by the Convention in its use of riot**

control agents, including the use against combatants who are parties to a conflict, in any of the following cases: [restates those instances enumerated by the Senate in its resolution]. . . . In accordance with Condition (26) on Riot Control Agents, I have certified that the United States is not restricted by the Convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the United States is not engaged in a use of force of a scope, duration and intensity that would trigger the laws of war with respect to U.S. forces.”

To clarify and implement U.S. policy on RCA employment under the CWC and E.O. 11850, the Chairman of the Joint Chiefs of Staff promulgated Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3110.07A, “Nuclear, Biological, and Chemical Defense; Riot Control Agents; and Herbicides” on 15 December 1998.

CJCSI 3110.07A provides in relevant part: The CWC prohibits the use of RCAs as a “method of warfare.” US policy distinguishes between the use of RCAs in war and in situations other than war. Approval to use RCAs is dependent on the situation in which their use is contemplated . . . .”

“Use in War: The Armed Forces of the US are prohibited from using any RCA or chemical herbicides in war unless the President approves such use in advance. The term “war” means a use of force of a scope, duration, and intensity that would trigger the laws of war with respect to US forces . . . . Requests to use RCAs in war shall be submitted IAW [EO 11850] and [CJCSI 3121.01, SROE]. The approval of any requested use will be assessed case by case based on applicable domestic and international law and relevant policy and operational considerations. . . . During war, use of RCAs outside a war zone is authorized as prescribed for peacetime.”

“Peacetime Military Operations and Operations Other Than War: IAW [*Presidential Letter to the Congress of the US, 25 April 1997*] the US is not restricted by the CWC in its use of RCAs, including against combatants who are a party to a conflict, in any of the following cases. . . : The conduct of peacetime military operations within an area of ongoing armed conflict when the US is not a party to the conflict; Consensual peacekeeping operations when the use of force is authorized by the receiving state including operations pursuant to Chapter VI of the UN Charter; Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the UN Charter. The subparagraphs above do not constitute an exhaustive list of authorized occasions for peacetime use of RCAs. Other scenarios, such as maritime interdiction / interception operations or other sanctions enforcement, may have to be evaluated on a case by case basis to determine whether Presidential authority is required under Executive Order 11850.

Analysis:

The CG seeks to use RCAs during war and within the war zone, where civilians are being used to mask or screen an attack and civilian casualties can be reduced or avoided. His contemplated use of RCAs falls within one of E.O. 11850’s “defensive military modes to save lives.”

Whether this contemplated use constitutes a “method of warfare” in terms of Article I (5) of the CWC (and is therefore prohibited under international law) is subject to extensive international and domestic debate. Whether or not it constitutes a method of warfare, only the President can

authorize the use of RCAs during armed conflict. The CG must submit an ROE Supplemental Measures Request IAW CJCSI 3121.01A, *The Standing Rules of Engagement for U.S. Forces*, up the chain of command. RCAs may be employed in this situation (during war) only with the President's specific approval.

**4. The CG, 2<sup>nd</sup> Infantry Division also wants to use non-self destructing, i.e., “dumb” anti-personnel landmines (APL) to protect the perimeters of Seoul. However, he is unsure about his legal authority in light of the various landmine treaties, executive orders, and moratoriums he has heard about. Brief the CG on the law and policy relevant to APL employment.**

Answer:

The CG has the authority to use non-self destructing (dumb) APL because he is defending against armed attack by the KPA across the DMZ.

Analysis:

On 16 May 1996, President Clinton issued **Presidential Decision Directive 54**. In PDD 54, the President promulgated U.S. policy on the employment of non-self- destructing (dumb) APL. PDD 54 provides that U.S. forces may no longer employ dumb APL except in the Korean Peninsula to defend against armed attack across the DMZ and for training purposes.

***The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines (APL) and on Their Destruction (The Ottawa Process or Landmines treaty).*** This convention prohibits the use, stockpiling, production, and transfer of APL. As of March 2000, 160 nations have signed the convention and 60 states have ratified it. The treaty entered into force on 1 March 1999. The U.S. declined to sign the treaty when other countries would not include an exception within its terms permitting employment of non-self-destructing APL in Korea and other uses of self-destructing (i.e., “smart”) APL.

***Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996*** (Protocol II or Amended Mines Protocol II). The U.S. is a party to Protocol II to the 1980 Certain Conventional Weapons Convention. Protocol II: (1) requires that all remotely delivered APL be equipped with self-destruct devices and back-up self-deactivation procedures; (2) requires that all non-remotely delivered APL not equipped with self-destruct / deactivation devices (i.e., dumb mines) be used within controlled, marked, and monitored minefields.

Protocol II actually permits employment of dumb mines within certain parameters, however, U.S. forces are constrained by the President's more restrictive U.S. policy expressed in PDD 54.

**5. Aerial photographs and other intelligence assets disclosed the following possible targets in Pyongyang, North Korea. You are the Operational Judge Advocate advising the targeting cell as it examines whether to add the particular item to the Coalition force's target list for attack. Review the following missions and targets for compliance with the law of war and advise the USFK planners accordingly.**

**A. A large power plant located at the northeast edge of Pyongyang, North Korea, which serves not only the North Korean KPA military headquarters, but also all of the civilian hospitals and residential areas of the city.**

Answer:

This power plant would be lawful target if it is essential to the operation of the North Korean military headquarters and the principle of proportionality is not violated.

Analysis:

A military necessity exists to conduct an attack against a power plant which serves the North Korean KPA HQ. The power plant is a military objective since it is an object whose purpose and use make an effective contribution to the enemy's military action and its destruction would offer Coalition forces a definite military advantage (i.e., the KPA HQ is powerless and can't communicate, etc. with North Korean forces).

The power plant, however, is a "dual-use" target. As such, civilians are immediately impacted by an attack against it. Therefore, the Commander must perform a Proportionality Balancing Test in order to determine if the risk of incidental injury or death to civilians or collateral damage to their property would be excessive in relation to the direct and concrete military advantage anticipated by attacking the power plant.

As part of his targeting analysis, the Commander must consider whether alternatives exist to attacking the power plant, which will thereby minimize resulting civilian harm? What about attacking the KPA HQ directly, rather than the power plant? During the conduct of the weaponeering process, targeteers might consider employing "soft kill" rather than "hard kill" technology against certain portions of the Pyongyang power grid which could reduce civilian harm.

During the Gulf War, the U.S. destroyed the Baghdad electric power plant supplying power to Iraqi command and control facilities. The power outage disabled water pumps, which also impacted civilians, who suffered from lack of water. Evidently, water-borne diseases spread among the civilian population due to the damage. This is now arguably a foreseeable result which Commanders must factor into consideration as part of their Proportionality Balancing Test.

**B. Troop billets (located in citizens' homes) in the southern part of the city. A large church located in the center of the billeting area.**

Answer:

Troop billets in non-combatant residences: Possibly lawful targets, however, Commander must attempt to verify the information that these are, in fact, troop billets.

Analysis:

The fact that the enemy chooses to place its military targets amongst the civilian population does not immunize the targets. Their military use by the enemy makes an effective contribution to military action (i.e., housing military forces) and transforms these civilian objects into military objectives, and their total or partial destruction, capture or neutralization would offers a definite



military advantage to Coalition forces. However, if other civilian homes not being used for military purposes will be impacted by the attack, then the Commander must perform a Proportionality Balancing Test.

Answer:

Church: Probably unlawful.

Analysis:

Providing the church is not being used for military purposes it is a protected place and may not be targeted. CIL, as codified in HR, art 27 requires that “all necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided that they are not being used at the time for military purposes.” However, the presence of church does not immunize those civilian houses being used for military purposes. However, if the church may be damaged as a result of the attack, then the commander must conduct a proportionality balancing test.

Coalition forces must also consider the warning requirement (CIL, codified by HR, art 26; and GP I, art 57(2)(c)). Attackers have a general requirement to warn before a bombardment - but only when civilians are present. The exception to this rule is when the attack is an **assault** (any surprise attack or an attack where surprise is a key element).

**C. A barracks complex at the western edge of the city which is marked with the Red Cross emblem on all its buildings. Intelligence assets have not determined whether this barracks complex has actually been converted into a hospital.**

Answer:

Preemptively unlawful.

Analysis:

A presumption of protection exists when the Red Cross / Red Crescent emblem is displayed. An attacking force **must warn** prior to attacking a hospital that is committing “acts harmful to the enemy.” The hospital must then receive a “reasonable time to comply” before commencing the attack (GWS, art. 21). The only exception to the warning requirement arises when an enemy is firing from that hospital. In this case, fire may be returned immediately without prior warning.

**D. A 40 ft. statue of the North Korean Leader, Kim Il Sung, located by itself in a large park.**

Answer:

The statute may be a lawful target.

Analysis:

The issue is whether this is a military objective and whether a military necessity exists to attack it. Is this statute an object that makes an effective contribution to the enemy war effort? The

only possible military advantage that might be gained from its destruction is some unquantifiable and speculative impact upon morale. Is civilian morale a legitimate target? Intentional attacks against civilian morale are intentional and unlawful attacks against civilians. Furthermore, history has repeatedly demonstrated that such attacks do not result in civilian capitulation, and in fact, frequently strengthen their resolve. The only justification for the statue's destruction is some negative impact upon North Korean military morale.

Note that under the 1954 Hague Cultural Property Convention (submitted to the Senate for advice and consent to ratification, but not yet ratified by the U.S.), the statue would probably not be protected as cultural property. Article 1 of this Convention defines cultural property as movable or immovable property of great importance to the cultural heritage of every people. In the eyes of most of the world's people, a statue of Kim Il Sun would not satisfy this requirement.

**E. A railroad station located in the center of the city. A residential area surrounds the station. The station is located in such a manner that the rail line could be effectively interrupted at this point. The risk of Coalition casualties is minimal. The railroad crosses several bridges outside the city. Destroying the railroad and the bridges would entail the use of the same amount of ordnance and would have the same effect as destroying the tracks at the rail station, but would also bring Coalition aircraft within range of SAM sites and significantly increase the risk of friendly casualties. By the same token, this attack will significantly reduce the risk of civilian casualties. Does the Law of War require CINC USFK to choose one target over the other?**

Answer:

No clearly correct (or wrong) answer, though both the railroad station and the railroad bridges are lawful targets.

Analysis:

Military necessity exists to attack either the railroad station or the bridges. This will disrupt North Korean lines of communication (LOC), critical to supply and reinforcement of their Army in the South. Both objects are military objectives. Each makes an effective contribution to the North Korean's war fighting capability, and the total or partial destruction or neutralization of either would constitute a definite military advantage to Coalition forces under the circumstances.

The railroad station is located within a residential area within the city. Attack of the railroad station will create a risk of incidental death or injury to civilians and collateral damage to their property. Therefore, the Commander must conduct a proportionality balancing test.

Attack of the railroad bridges will accomplish the same military purpose (severing the enemy's LOC), without the risk of civilian harm, but with increased risk of friendly casualties.

It is important to note that GPI, art 57(3), provides: "When a choice is possible between several military objectives for obtaining a **similar military advantage**, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." Does this then require Coalition forces to choose the bridges rather than the railroad station?

GP I, art 57(3) certainly seems to indicate that the answer is yes. Recent state practice, however, has not clearly supported the concept of reducing civilian casualties at the risk of increasing friendly casualties. For example, during Operation Allied Force, NATO aircraft frequently delivered ordnance against targets from an altitude beyond the reach of Serbian air defenses (15,000+ feet). This may have meant that in some cases a target could not be verified with the naked eye and that the risk of civilian harm was increased, but the risk of friendly casualties was thereby reduced.

Clearly, Commanders must take all reasonable precautions to keep civilian casualties and damage to civilian objects to a minimum. In light of state practice, to what extent this requires a commander to absorb additional casualties is uncertain.

There is no clear official U.S. policy pronouncement on this issue.

In the past, however, U.S. Law of War experts examining the issue have articulated the position that a “similar military advantage” is not achieved when a force will suffer more casualties in one attack relative to another. It is important to consider that in determining the military advantage to be gained from a particular attack a commander is not examining alternatives (military objectives and methods of attack) in a vacuum. While he must strive to reduce civilian harm and select a military objective or method of attack that supports these efforts, he can only determine military advantage by examining a myriad of factors related to the overall operational strategy. These factors include security of the force and conservation of material, as well as mission accomplishment in the context of the overall operational and/or strategic plan.

Employing this view, attack of the railroad bridges is likely to increase friendly casualties and loss of Coalition aircraft as a result of the surrounding SAM threat, but reduce civilian harm. Alternatively, attack of the railroad station is likely to increase civilian harm, but reduce friendly losses. The military advantage gained from attack of the railroad bridges relative to attack of the railroad station will be substantially less if Coalition assets suffer such losses. Thus, this attack does not offer a “similar military advantage” in the language of GP I, art. 57(3). In conducting his proportionality balancing test, CINC USFK may consider the reduced military advantage offered by attack of the railroad bridges relative to that offered by the railroad station as he balances the risk of civilian harm against this anticipated military advantage. The commander has to make a difficult judgment call.

Recall that the Law of War imposes obligation upon the defender, as well as the attacker. Under GP I, art 58, North Korean forces must: remove civilians and civilian objects as much as possible from the vicinity of military objectives; avoid locating military objectives within or near densely populated areas; take the other necessary precautions to protect the civilian population from the dangers of military operations.

The Commander must also consider the warning requirement before attack. (See earlier discussion in question 5B).

**6. As the operational law attorney for the 82<sup>nd</sup> Airborne Division, you have been asked to review the ROE before the unit deploys to Korea. The 82<sup>nd</sup> Airborne Division’s assigned area of operations will contain few, if any, friendly forces or civilian populace. The commander seeks to incorporate the following language into the Rules of Engagement for designated areas, such as the fields of fire around the Division’s nighttime perimeters. What do you think?**

**“SPECIFIED STRIKE ZONES: Areas designated by the Division Commander in which there are no friendly forces or civilian populace and in which all targets may be attacked on the initiative of individual soldiers. There is no requirement for further clearance or coordination prior to the initiation of combat activity.”**

Answer:

There is nothing thing *per se* unlawful about the ROE.

Analysis:

The only problem is that it may create a “free-fire zone” mentality (anything that moves is a target). Troops should realize that only military objectives are targets. In this case, military objectives include combatants (anyone—including civilians—who engage in belligerent activities on behalf of a party to the conflict), defended places, and objects which by their nature, use, location, or purpose make an effective contribution to military action. Protected persons (civilians not participating in the hostilities and, sick and wounded former combatants who are hors de combat), protected places, and protected property such as medical and cultural property are not lawful targets.

**7. Assume that Coalition forces have stopped the North Korean Army and begun to gain momentum, pushing the retreating KPA northward in front of it. Converging on Highway 1, the shortest route back to North Korea, KPA troops are flooding northward toward the Uijongbu Corridor and the 38<sup>th</sup> parallel. USFK planners intend to allow KPA forces to withdraw along the highway and then fix them in place utilizing air-dropped land mines. Once the KPA is fixed in place, air assets can then conduct massive aerial attacks against these forces, utilizing the full arsenal of weapons. The operation is called “Operation TURKEYSHOOT.” Is this plan lawful?**

Answer:

Providing, the proportionality principle is satisfied with respect to any civilians impacted by the attack, this is a lawful targeting plan.

Analysis:

Standard targeting analysis pertains. Indeed, this is an ideal place to target KPA combatants. Military necessity exists to destroy the combatant force and its warfighting capability. Given the location with few, if any non-combatants, the risk of civilian harm is low.

Mines. The dropping of APL in this case is lawful. There appears to be little if any chance of indiscriminate damage to civilian lives or property given that the mines will be dropped on the road at or near the position of the retreating forces, presumably to “fix” the forces in place. U.S. practice is to employ self-destructing mines. The Operational Judge Advocate should encourage operators to set the mines for self-destruction / deactivation for the shortest period of time consistent with mission accomplishment and force protection. (See earlier discussion relative to landmines).

Surrender. Surrendering to an aircraft presents obvious practical difficulties. Questions exist as to whether an aircraft must (or even has the capability to) accept an offer to surrender. HR, art

23 prohibits killing or wounding “**an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion.**” What discretion means is unclear. The Hague Regulation it says nothing regarding ceasing fire to give the enemy an opportunity to surrender, i.e., the laying down of arms. It may be unclear whether the combatants are gesturing (or waving white flags) in hopes the aircraft commander will not shoot and then return to their withdrawal maneuver once the aircraft departs or are genuinely attempting to surrender.

Waving a white flag simply means a desire to communicate with the enemy. U.S. forces are not required to cease fire upon seeing a white flag. It’s only when the unit becomes *hors de combat*, by ceasing resistance and offering themselves to the control of U.S. forces, that they become protected.

The traditional rule was that aircraft did not have the capability to accept a surrender and therefore were not required to halt their attack. During the Gulf War, though, many Iraqi soldiers “surrendered” to Coalition aircraft. But what should the aircrew do if half the line surrenders during the bombardment and the other half does not? This is probably more of a moral question than a legal one. The enemy must convey its clear intent to surrender. If only half the line throws down its arms, then to the extent practicable, avoid bombing them. Hopefully the unarmed individuals will then do a good job of avoiding bombardment. If the enemy is merely retreating, then they are still in combat since they may rejoin their forces later.

The issue must be addressed on a case by case basis. It would be helpful if Psychological Operations forces had already instructed enemy ground forces to take certain steps to indicate surrender (white flags, abandonment of weapons and vehicles, and walking in a certain direction). Clarify the extent to which we anticipate the enemy will be unable to resist and ensure that aircrews performing the mission are sensitive to signs of surrender. Once the enemy is incapable of further resistance, it may be consistent with the principle of avoidance of unnecessary suffering to wait for signs of surrender (depending on the circumstances at the time).

There is concern over the plan’s reference to the use of the “full arsenal of weapons.” Under Department of Defense Directive 2000.2, Feb 91, “the Head of each DoD component will ensure that the Judge Advocate General of the Component conducts a legal review of all weapons intended to meet a military requirement of the Component to ensure that the intended use of the weapon in armed conflict is consistent with the obligations assumed by the United States . . . . under all applicable treaties, with customary international law, and, in particular, with the laws of war.”

Weapons and weapons systems must receive legal review prior to their employment. Furthermore, lawful weapons must not be employed in an unlawful manner. The Operational Judge Advocate must assist the operators in complying with these requirements.

Lastly, as part of the USFK legal staff, the Operational Judge Advocate should coordinate with the PAO and J-3 about changing the title of this operation from “Operation Turkeyshoot” to something else.

**8. While coordinating with the JA on changing the name from “Operation Turkeyshoot” the USFK PAO wants to discuss the following issue. Intelligence reports indicate a labyrinth of KPA fortified tunnels in and around Pyongyang which are probably impervious to airstrikes and indirect fire weapons. Therefore, USFK is considering**

**utilizing blade tanks to employ the “plow tactic” made famous during DESERT STORM. The PAO is concerned about the lawfulness of this tactic, not to mention the public affairs angle. What’s the deal?**

Comment:

This question highlights the public affairs importance of methods and means of warfare. Although a method of warfare may not be illegal, it may create a public affairs issue. When responding to the DESERT STORM employment, DoD spokesman Pete Williams said that there “is no nice way to kill someone.”

Answer:

The PAO should be told that our forces complied with the law of war and that every opportunity was given to the enemy to surrender. Absent their surrender, combatants, regardless of being under-equipped, poorly trained, and in vulnerable tactical settings—are proper targets.

Comment.

The issue here is whether or not the tactic used by the CINC is calculated to cause unnecessary suffering. Clearly not. The law of war is not based on a “sporting” theory of warfare that requires one side to expose itself to an equal risk of high casualties. Death by being buried alive is not less inhumane than by being gored by a bayonet or shot with a round from an M-16.